LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 22 1968
JOHN F. DAVIS, CLERK

No. 936

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

STEPTOE AND JOHNSON, et al.

Petitioners

v.

FORT MYERS SEAFOOD PACKERS, INC.

Respondent

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GLENN A. MITCHELL
1200 - 18th Street, N.W.
Washington, D.C. 20036

and

EDWIN M. SLOTE
475 Fifth Avenue
New York, New York 10017

Counsel for Respondent

Washington, D. C. · THIEL PRESS · 202 · 393-0625

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

STEPTOE AND JOHNSON, et al.

Petitioners

v.

FORT MYERS SEAFOOD PACKERS, INC.

Respondent

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether the court of appeals was correct in holding that the statute of limitations in a legal malpractice action commences to run when damage from the negligent malpractice occurs and not at the time of the alleged negligence.

STATEMENT OF THE CASE

The respondent, Fort Myers Seafood Packers, Inc., is a Florida corporation engaged in the business of operating fishing vessels with headquarters in Ft. Myers, Florida (JA 91a). The petitioner, Steptoe and Johnson, is a partnership engaged in the practice of law in the District of Columbia, and the petitioner, I. Martin Leavitt, is a partner in Steptoe and Johnson (JA 13a).

For a number of years prior to 1962, the petitioners represented a New York importer of shrimp and other seafood, Atalanta Trading Corp., of which Mr. Bent Mogelberg was an officer (JA 13a). In April 1962, Mr. Mogelberg was instrumental in arranging a business venture involving respondent, Atalanta Trading Corp. and a Venezuelan firm, Frioven-Zulia, S.A., on the following basis: respondent with its boats would catch shrimp in Venezuelan waters, Frioven-Zulia would process it, and Atalanta would then sell and distribute the shrimp in the United States (JA 38a, 114a).

In order to further this arrangement, Mr. Mogelberg in April 1962, telephoned Atalanta's attorney, Mr. Leavitt, and asked him to send to respondent's president a copy of a contract which had been used between a Colombian corporation and other fishing boat owners in connection with a similar venture in the waters of Colombia. Mr. Mogelberg also asked Mr. Leavitt to send respondent a copy of the form (Form MA-29) used to secure Federal Maritime Administration approval of the charters for respondent's vessels (JA 38a, 93a, 149a). Mr. Leavitt sent this material to respondent on April 12, 1962 (JA 149a). By letter of May 14, 1962, Mr. Mogelberg sent to Mr. Leavitt a copy of the aforesaid Colombia contract along with suggested modifications designed to fit the aforesaid Venezuelan venture (JA 28a-35a).

By May 16, 1962, Mr. Leavitt followed Mr. Mogelberg's suggestions. He incorporated the changes noted by Mr. Mogelberg into a new contract, prepared the contract at the

offices of Steptoe and Johnson and sent two copies thereof with a letter dated May 16, 1962, to respondent. Also with that letter were twelve copies of the Federal Maritime Administration Form MA-29, to be completed by respondent (JA 19a-21a). The letter further advised respondent on what measures were necessary to satisfy the federal customs authorities. The letter closed with a request that all documents be executed and returned to Mr. Leavitt, and the directive that if respondent's president had any questions, he was to telephone Mr. Leavitt (JA 20a-21a).

Paragraph Thirteenth of the aforesaid contract recited that "Neither the laws of Venezuela nor the provisions of this Contract requires or contemplates any change in the present American registry of the boat(s)" (JA 26a). The respondent's vessels were at all times under the American registry.

On June 16, 1962, respondent had signed the contract and mailed it to Mr. Leavitt, with the application forms necessary to secure Maritime Administration approval of the charters on respondent's boats (JA 106a-107a). Mr. Leavitt filed the applications with the Maritime Administration on June 19, 1962 (JA 193a).

Relying upon Paragraph Thirteenth of the aforesaid contract, the respondent's vessels, still under American registry, left Florida waters on July 18, 1962, for Maracaibo, Venezuela (JA 127a). These vessels arrived at the Venezuelan port of Maracaibo on July 25, 1962 (JA 127a). They were promptly impounded by Venezuelan authorities on July 25, 1962, for illegal entry into Venezuelan waters under the American registry (JA 127a-128a). Armed Venezuelan guards patrolled respondent's vessels for twenty days thereby compelling the respondent to forego the entire Venezuelan enterprise (JA 128a).

On July 22, 1965, respondent filed a two count complaint in the United States District Court for the District of Columbia against the petitioners. The first count charged the petitioners with "false and fraudulent warranties," and the second count alleged negligence consisting of legal malprac-

tice (JA 2a-11a). The petitioners, in their answer, generally denied the allegations of wrongdoing and asserted as a Second Defense that "the complaint was barred by the three year District of Columbia Statute of Limitations" (JA 13a). Following the depositions of respondent's president, Carl Abbott, and Mr. Leavitt, the petitioners filed a motion for summary judgment on the ground that the three year statute of limitations had expired prior to the filing of suit on July 22, 1965. The petitioners' position was that the cause of action in negligence, if any, occurred at the time Mr. Leavitt sent the Venezuelan contract to respondent on May 16, 1962; that is, at the time of the alleged negligence, and not, as claimed by respondent, at the time of the injury on July 25, 1962.

This motion was briefed and argued before Judge Gasch of the United States District Court for the District of Columbia on March 15, 1966. On April 25, 1966, Judge Gasch rendered a memorandum sustaining petitioners' position that the statute of limitations had expired before suit was filed (JA 85a-88a). On May 3, 1966, Judge Gasch issued an order granting summary judgment in favor of both petitioners (JA 89a).

The respondent appealed from the summary judgment to the United States Court of Appeals for the District of Columbia Circuit. That court, through a unanimous three-judge panel, one of whom rendered a separate concurring opinion, reversed the District Court. The petitioners filed a petition for rehearing *en banc* which was denied on September 22, 1967.

ARGUMENT

The Decision Below Is Not in Conflict with Local Decisions

The decision of the court of appeals was correct and consistent with controlling precedents.

The petitioners have conceded, and the District Court so found, that the complaint alleges negligence consisting of legal malpractice (JA 40a, 88a). It is settled law in the District of Columbia that a cause of action grounded in negligence does not accrue for purposes of the statute of limitations until injury results from such negligence. *Hanna v. Fletcher,* 97 U.S. App. D.C., 310, 313, 231 F.2d 469, 472 (1956), cert. denied, 351 U.S. 989 (1956). In the instant case the negligence complained of consisted of petitioners' misinformation that respondent need not change the registry on its shrimping vessels from American to Venezuelan in order to fish for shrimp in Venezuelan waters (JA 26a).

Acting pursuant to this misinformation as embodied in a contract prepared by petitioners and forwarded to respondent for execution, respondent sailed its vessels to Venezuelan waters under American registry. Upon entering Venezuelan waters on July 25, 1962, respondent's vessels were impounded by Venezuelan authorities for failure to have its vessels under Venezuelan registry. Not until July 25, 1962, did petitioners' misadvice cause damage to respondent. Hence the court of appeals was correct in holding that suit filed on July 22, 1965, was timely.

Contrary to petitioners' assertion in their petition, the court followed the leading District of Columbia case, *Hanna v. Fletcher,* supra, on the question here involved. As noted, that case held that in negligence actions, the action does not accrue until injury. And, the court below saw "no good reason for drawing. . .a distinction between malpractice suits and other negligence actions." 381 F.2d at 262.

Petitioners contend that the court's decision conflicts with local decisions in that it failed to consider alleged in-

jury to respondent before the impounding of its boats on July 25, 1962.

The obvious flaw in this contention is that the petitioners have been and are unable to find any record evidence of injury to respondent before July 25, 1962. Thus, the last paragraph of the court's opinion containing dicta that suit was timely whether or not there was injury before July 25, 1962, cannot possibly "wreak havoc upon the administration of the District's laws" as predicted by petitioners (Petition, p. 9). At most, the court by such dicta noted its approval of the settled rule in the federal courts that in malpractice actions the statute of limitations does not commence running until the plaintiff discovers the damage caused by malpractice even though there may be earlier unknown damage. *Quinton v. United States,* 304 F.2d 234, 240 (5th Cir. 1962), citing *Urie v. Thompson,* 337 U.S. 163 (1948); *Hungerford v. United States,* 307 F.2d 99, 102 (9th Cir. 1962).

Petitioners' reliance on *Wilcox v. Plummer,* 29 U.S. 172 (1830) is misplaced. *There the action was in assumpsit, not negligence.* Therefore, the Court's language to the effect that the action could be brought immediately upon the attorney-defendant's breach of his contractual duty to his client irrespective of consequential damages is inapposite to this case based upon negligence. As already mentioned, it is settled that there can be no cause of action in negligence without damage. An action in assumpsit is based upon a contract, and as noted in *Wilcox v. Plummer,* supra at 181-82, the breach of contract "admit[s] of a definite assignment of date. . .*it is clear that damage is not the cause of action.*" (Emphasis added.) As noted above, damage *is* necessary for a cause of action in negligence. Until it occurs there can be no accrual of the cause of action. And, this record shows no injury before July 25, 1962. Therefore, the court was clearly correct in its decision that the suit filed on July 22, 1965, was not barred by the statute of limitations.

Similarly inapplicable to this case is *Unexcelled Chemical Corp. v. United States,* 345 U.S. 59 (1953), where the United States filed suit to recover damages for breach of contract under the Walsh-Healy Act, 49 Stat. 2036, as amended, 40 U.S.C. 535, et seq. Under that Act, the government could recover damages on government contracts when the contractor employed child labor provided suit was filed within two years after the cause of action accrued. The court held that the action accrued when the wrongful employment of children occurred. Hence, suit was dismissed for failure to file within two years after such employment. The case did not involve a negligence suit much less a malpractice claim.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

GLENN A. MITCHELL
1200 - 18th Street, N.W.
Washington, D.C. 20036

and

EDWIN M. SLOTE

475 Fifth Avenue
New York, New York 10017

Counsel for Respondent